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No. 97-705

In The

Supreme Court of the United States

October Term, 1997

KERR-McGEE CORPORATION and CYPRUS FOOTE MINERAL COMPANY,

Petitioners,

vs.

KEE TOM FARLEY, Individually and on behalf of the Estate of LUCY K. FARLEY, CARMELITA FARLEY JOE and HAROLD KADY, SR., Individually and on behalf of the Estate of JULIA MAE KADY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Can an Indian tribal court be divested of adjudicatory authority to hear a case involving alleged tortious action which occurred on the tribe's territory and which harmed members of the tribe where there is no statute or regulation divesting the tribe of such authority or prohibiting it from hearing such a dispute?

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STATEMENT OF THE CASE

Petitioners are two mining and engineering companies that between 1952 and 1973 ran a vanadium and uranium mill on the Navajo Nation's reservation in Shiprock, New Mexico. The mill was run pursuant to contracts and licenses which petitioners had entered into with the Navajo Nation and the Atomic Energy Commission. The land on which the mill was situated was owned by the Navajo Nation and licensed to petitioners.

The underlying lawsuit in this litigation was commenced on January 12, 1995 in the Shiprock District Court of the Navajo Nation. The suit was brought by three individual Navajos and arises out of the cancer-caused deaths of two of their family members. The complaint alleges that these cancers were the result of radioactive, toxic and chemical emissions negligently released by petitioners into areas adjacent to the Shiprock Mill where plaintiffs and their now-deceased family members lived.

The Navajo Nation has a complete court system analogous to state court systems, including trial courts and a Supreme Court. The Navajo Nation has due process guarantees and a code of civil procedure modeled on the Federal Rules of Civil Procedure. Navajo court decisions are reported in the Navajo Law Reporter.

On April 21, 1995, petitioners sued in the United States District Court for the District of New Mexico seeking to enjoin the Navajo court plaintiffs from proceeding with their underlying lawsuit on the ground that the Navajo tribal courts lacked jurisdiction to hear claims against these petitioners. Petitioners asserted that the Price-Anderson Act, 42 U.S.C. § 2011, *et seq.*, created both a purportedly exclusive federal cause of action and a federal forum to resolve any cases "arising out of or resulting from a nuclear incident." (*See* Petitioners' Appendix, hereinafter "PA", 39a).

The District Court held, *inter alia*, that the Price-Anderson Act neither created exclusive federal court jurisdiction, nor divested Indian tribal courts from hearing disputes like the present and, that, under the tribal exhaustion doctrine established by this Court, the present case should proceed in Navajo Tribal Court. (PA 28a-34a). The District Court's opinion is reported at 915 F. Supp. 273.

Petitioners appealed to the Tenth Circuit which, on June 25, 1997, denied their appeal, affirming the District Court's holdings and decision in an opinion reported at 115 F.3d 1498. (PA 4a-22a). On July 24, 1997, the Court of Appeals denied both petitioners' petition for rehearing and their suggestion for rehearing en banc. (PA 62a).

REASONS FOR DENYING THE WRIT

Petitioners present no grounds that would warrant this Court's review.

First, the decision of the Court of Appeals does not conflict with that of any other circuit.

Second, the Court of Appeals' decision was merely one of abstention pending re-review — a decision holding that the issue of federal regulatory or adjudicatory exclusivity should first be heard by the Navajo courts prior to a possible reconsideration by the federal courts. Contrary to petitioners' intimations, the present issues will not escape federal court review. Petitioners will have the ability to challenge the Navajo courts' decision on jurisdiction should the case proceed to judgment and appeal.

Third, petitioners' claims are misplaced. What they propose is that federal courts possess exclusive jurisdiction over tort actions involving radiation health and safety. Petitioners are wrong.

The federal government *does not* "exercise exclusive authority to regulate nuclear safety" (Pet. i) and petitioners can cite no statute or regulation to support their contention. To the contrary, the relevant provision of the applicable law, the Price-Anderson Act, expressly provides that cases involving injury from nuclear incidents are to be governed by substantive *state* law, 42 U.S.C. § 2014(hh), — a provision absolutely inconsistent with any proposition that the federal government's regulatory authority is exclusive.

Nor is there an "exclusive federal remedy for nuclear torts." (Pet. i). The Price-Anderson Act, by its very terms provides for concurrent federal and state court jurisdiction (with a right of removal from state to federal court). 42 U.S.C. § 2210(n)(2). Necessarily, petitioners' claim is that Congress must have *meant to* provide for an exclusive federal remedy for cases filed in Indian courts even though it did not do so explicitly. This would "turn[] the historic tribal sovereignty analysis on its head." (PA 28a). Well-established principles of federal law hold that Indian tribes cannot be divested of jurisdiction in the absence of an express and specific Congressional enactment. Nothing in the Price-Anderson Act divests Indian courts of jurisdiction to hear claims involving tortious injury arising out of the operation of a uranium mill.

The District Court and the Court of Appeals correctly and unanimously rejected petitioners' argument. The petition should be denied.

I.

THIS CASE PRESENTS NO ISSUE THAT WILL ESCAPE FEDERAL COURT REVIEW.

Petitioners intimate that unless this Court now considers the Court of Appeals' decision, there will be no review of the jurisdictional issues presented. Petitioners are wrong.

First, the decisions below were the first to address the issue of the Price-Anderson Act's applicability to Indian tribes. No other Court of Appeals has addressed the issue and certainly the decision below has set up no conflict among Courts of Appeals.[1]

Second, notwithstanding what petitioners try to suggest to the Court, they will have full opportunity to challenge the issues presented in the courts below. Three results are possible in the underlying case: (a) petitioners could win in the tribal court; (b) the case could settle; or (c) the Navajo plaintiffs-respondents could succeed in the tribal court and then petitioners could challenge the jurisdictional issue in federal court. Indeed, while petitioners mix jurisdictional and choice-of-law issues repeatedly in their petition, the choice-of-law issues have not as yet been decided by the Navajo courts. In fact, petitioners are now requesting the tribal court to reconsider its ruling concerning jurisdiction and are presently raising before the tribal court the exact same choice-of-law questions they contend should compel this Court's review. (*See* Pet. 15-16). Furthermore, the decisions of the Navajo trial court on these matters will be subject to review by the Navajo Supreme Court. And, ultimately, the issue of jurisdiction could then, again, be raised by petitioners in the federal courts.

It is manifestly premature for petitioners to contend that this Court should review this case when the jurisdictional and choice-of-law contentions petitioners are now making are still

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1. The same issues here are presented in two cases now pending in one proceeding before the Ninth Circuit, *El Paso Gas Co. v. Neztsosie*, *appeal pending*, No. 96-17121 (9th Cir.); *Cyprus Foote Minerals Co. v. Richards*, *appeal pending*, No. 96-17139 (9th Cir.). There is no reason to believe that the Ninth Circuit will reverse the District of Arizona's decision which permitted the Navajo tribal cases to proceed in Navajo tribal court or that the Ninth Circuit will disagree with the Tenth Circuit's decision below in this case.

to be resolved by the tribal court. Under such circumstances where a full record has not even been developed, recourse to this Court is neither necessary nor efficient.

II.

THE COURTS BELOW CORRECTLY HELD THAT THE TRIBAL EXHAUSTION DOCTRINE REQUIRES THAT THIS CASE FIRST PROCEED IN TRIBAL COURT.

Petitioners do no better on the merits of their claim.

Initially, they attempt to disregard the "tribal exhaustion doctrine" established by *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985), and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). This doctrine is based on Congress' policy of encouraging tribal self-government. *See National Farmers Union*, 471 U.S. at 856-857. Under this doctrine, when a lawsuit is brought over which an Indian tribal court may have jurisdiction, a defendant may not challenge in federal court the tribal court's exercise of jurisdiction without first exhausting all tribal court remedies so long as three exceptions are not applicable: the assertion of tribal jurisdiction is not motivated by a desire to harass or is conducted in bad faith; the action is not "patently violative" of an "express jurisdictional prohibition"; or "exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction." *National Farmers*, 471 U.S. at 856 & n.21; *Iowa Mutual Ins. Co.*, 480 U.S. at 19 & n.12; *see also Strate v. A-1 Contractors*, __ U.S. __, 117 S. Ct. 1404, 1411 & n.7 (1997). Ignoring the tribal exhaustion doctrine, petitioners brought this case in federal court to enjoin a tribal court lawsuit without exhausting tribal court remedies.

Petitioners do not meet any of the three exceptions to the tribal exhaustion doctrine. Their only argument is that the

underlying case's proceeding in Navajo tribal court was "patently violative" of an "express jurisdictional prohibition". However, as both the District Court and the Court of Appeals recognized, the Price-Anderson Act contains no prohibition on tribal court jurisdiction whatsoever, much less an "express" prohibition that would be "patently violat[ed]" by exercise of tribal court jurisdiction. (*See* PA 12a-13a, 28a-32a). In the words of the Court of Appeals: "[s]imply put, 'exclusive jurisdiction' is not conferred unless conferred explicitly." (PA 13a).[2]

Petitioners all but admit this in their petition when they write that the Act "clearly reflects an *intent* to make a federal forum available to resolve" nuclear tort claims. (Pet. at 7) (emphasis supplied).[3] An implicit intent to create a jurisdictional prohibition cannot, by definition, constitute an "express" one. There is not

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2. Respondents do not agree with the Court of Appeals' conclusion that the Price-Anderson Act applies to this case since they do not agree the Act's definition of a "nuclear incident" was intended to encompass any and all injuries related to uranium. However, that determination of the Court of Appeals is not being here challenged by respondents.

3. Petitioners' arguments as to why Congress "clearly" must have intended that tribal courts cannot hear the present case are: (1) that a tribal court might get the law wrong; (2) that consolidation of all actions arising out of nuclear torts could not be achieved; and (3) that a misapplication of the law might occur so that a defendant could be forced to defend against punitive damages. (Pet. 16-17). The first and third of these contentions are simply arguments that Indian courts cannot be trusted to apply the law correctly; yet "[t]he alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement." *See Iowa Mut. Ins.*, 480 U.S. at 19. As to petitioners' argument regarding consolidation, the District Court effectively addressed this point when raised below: "[i]t was by virtue of federal government contracts that nuclear mills were constructed and operated on the Navajo reservation. Congress is obviously aware of the possibility of nuclear torts occurring on tribal lands", yet it did not provide for consolidation of cases from tribal courts, as it did from state courts. (PA 37a).

a single decision by any court holding that there can be an "implicit" exception to the tribal exhaustion doctrine's "exclusive jurisdiction" rule. As the District Court wrote,

> [b]e it intentional or an oversight, until Congress addresses the issue, this Court will not interpret its silence as an "express jurisdictional prohibition." To do so would ignore important Congressional and judicial concerns regarding tribal sovereignty.

PA 37a.[4]

III.

THERE IS NO REGULATORY BAR TO THE NAVAJO COURT'S JURISDICTION OVER THE UNDERLYING ACTION.

Facing an inability to meet the three exceptions to the tribal exhaustion doctrine, petitioners claim the Navajo tribe lacks

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4. The courts, including this one, have repeatedly rejected the proposition that Indian courts can implicitly be stripped of jurisdiction. *See, e.g., Iowa Mut. Ins.*, 480 U.S. at 17-19 (interpreting 28 U.S.C. § 1332, the diversity jurisdiction statute); *United States v. Plainbull*, 957 F.2d 724, 726-727 (9th Cir. 1992) (where statute, 28 U.S.C. § 1355, provided for federal jurisdiction of cases "exclusive of the courts of the States", such a delegation of exclusive jurisdiction to federal courts did not apply to tribal courts because "a tribal court is not a state court" and tribal courts were therefore not divested of concurrent jurisdiction); *Becenti v. Vigil*, 902 F.2d 777, 780 (10th Cir. 1990) (where federal removal statute, 28 U.S.C. § 1441, provided for removal of cases from "state" courts but not from tribal courts, the court wrote, "The question before us, however, is not whether Congress has the power to authorize removal of actions commenced in tribal courts against federal officials, but rather whether Congress has in fact done so . . . With this in mind, we conclude that the statutory language referring to actions commenced in 'State court' does not extend to an action in the Jicarilla Apache Tribal Court.").

adjudicative authority over this case because it lacks regulatory authority over "nuclear safety." Petitioners are wrong for two reasons.

A. The Price-Anderson Act Does Not Create Exclusive Federal Court Jurisdiction Over Nuclear Torts.

There is no exclusive, preemptive federal court jurisdiction over tortious conduct arising out of nuclear activities. Contrary to petitioners' claim that "the [Price-Anderson] Act's adjudicatory scheme requires application of federal law to all claims of injury from nuclear materials" (Pet. 7), the Act expressly provides that in an action arising out of a "nuclear incident", the "substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent" with provisions of the Act. 42 U.S.C. § 2014(hh). This provision is totally inconsistent with any claim that the federal government's regulatory authority is exclusive over nuclear torts.

Indeed, there is no federal common law whatsoever that would apply to this case. It is not surprising, therefore, that in all of Point I of their petition (Pet. 8-13), petitioners nowhere can point to a single statute or regulation upon which they base their claim for exclusive federal regulatory authority over tort claims arising from the alleged negligent operation of a facility that handled radioactive materials.

All that the petitioners can cite is to the Tenth Circuit's *dicta* that was itself based on *dicta* from this Court's decision in *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983), as to federal preemption over "nuclear safety." (Pet. 12). However, the *Pacific Gas* language cited by petitioners did not address the relevant issues presented by a personal injury case like the present where the applicable

statute provides in relevant part that *state* law is to provide the substantive rule of decision. At issue in *Pacific Gas* were dual and potentially competing state and federal regulatory regimes, a situation that did not address the adjudicatory rights of the states, much less Indian tribes. Petitioners cannot point to any federal regulation that is implicated, much less contradicted, by the present lawsuit being heard under Navajo substantive law so long that law is not inconsistent with federal law.

B. This Court's Decision In *Strate* Is Inapplicable Here.

Petitioners' argument is also flawed due to its misplaced reliance on this Court's decision of last term in *Strate v. A-1 Contractors*, *supra*. In *Strate*, the Court addressed the interplay between the tribal exhaustion doctrine and the limits on tribal court jurisdiction set forth in *Montana v. United States*, 450 U.S. 544 (1981). Under *Montana*, tribal jurisdiction over a lawsuit involving non-tribe members can lie concerning incidents that arise on *non-Indian*-owned land within a reservation if either there is a "consensual relationship" between the defendant's activity at issue and the tribe's regulatory authority or the conduct at issue "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Strate*, 117 S. Ct. at 1409 (summarizing *Montana*).

Strate involved the adjudicatory reach of a tribal court where: (1) a controversy existed between two non-Indian parties; (2) which arose out of an accident on a State highway as to which an Indian tribe had ceded control and thus constituted "alienated, non-Indian land"; and (3) no statute or treaty authorized the tribe to govern the conduct of nonmembers on the highway in question. *Strate*, 117 S. Ct. at 1407. The Court's discussion of regulatory and adjudicatory authority upon which petitioners rely thus arose in a situation where a non-Indian was seeking to invoke tribal court jurisdiction against another non-

Indian arising out of an incident that occurred on non-tribal lands. Since the tribe had no regulatory authority over either the lands or the activity in question, it also could not have adjudicatory authority under the *Montana* analysis. Indeed, the Court stressed that the case involved a dispute that is "distinctly nontribal in nature", *id.* at 1407, and explicitly stated that its decision "express[ed] no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation." *Id.* at 1406.

Petitioners' attempt to stretch *Strate* to govern the present case will not wash. Here: (1) the underlying lawsuit is brought by members of the Navajo tribe; (2) the incidents underlying the lawsuit — injury from milling operations — took place *exclusively* on tribal lands; and (3) the tribe never divested itself of jurisdiction over either the activities at issue or the tribal land in question. The essence of the present case is that it involves personal injury claims brought by tribal Indians in their own tribal court alleging harms caused to Indians by non-Indians who entered onto the tribe's land pursuant to a consensual relationship with the tribe.

IV.

PETITIONERS IGNORE ESTABLISHED PRINCIPLES OF INDIAN SOVEREIGNTY.

Finally, even if a legitimate issue existed as to whether Congress intended absolutely to preempt state regulatory authority over tortious claims arising from the operation of a facility related to the nuclear industry, this case involves the alleged preemption of Indian rights and sovereignty, an entirely separate analysis from that concerning state governments.

"Indian tribes occupy a unique status under our law." *National Farmers Union*, 471 U.S. at 851. One important aspect

of this unique status is that Indian jurisdiction over Indian lands is absolute unless expressly limited by Congress. As this Court wrote in *Iowa Mut. Ins.*, "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty" and that "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless *affirmatively limited* by a specific treaty provision or federal statute." 480 U.S. at 18.

While Congress has the power to limit or abolish a tribe's sovereignty, the "Congressional intent to infringe on tribal sovereignty must be clear." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978). Because Indian tribes

> retain[] all inherent attributes of sovereignty that have not been divested by the Federal Government, *the proper inference from [Congressional] silence . . . is that the sovereign power . . . remains intact.*

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 n.14 (emphasis supplied); *accord Iowa Mut. Ins.*, 480 U.S. at 18; *see also United States v. Wheeler*, 435 U.S. 313, 323 (1978) (until Congress acts to diminish tribal sovereignty, "the tribes retain their existing sovereign powers"); *Smith v. Moffett*, 947 F.2d 442, 444 (10th Cir. 1991) ("Jurisdiction presumptively lies in the tribal court . . . unless Congress has expressly limited that jurisdiction."); *United States v. White*, 508 F.2d 453, 456 (8th Cir. 1974) (statutes should not be construed so as to abrogate rights of tribal self-government absent specific Congressional intent to the contrary).[5]

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5. Petitioners ignore the established rule and half-heartedly claim that in other areas Indian tribes have been implicitly held to be divested of jurisdiction (Pet. 17-18). Petitioners' cases demonstrate petitioners' error. While *dicta* in *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), discuss superannuated precedents, the Court's

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If Congress wished to do so, it certainly knows how to provide for express federal jurisdiction and how to divest tribal courts of jurisdiction.[6] Since Congress did not divest Indian courts of jurisdiction to hear tort claims arising out of nuclear facilities, the Price-Anderson Act must be construed as written and not rewritten by the courts to say what petitioners believe Congress must have meant.

(Cont'd)
decision that the Federal Power Act constituted a comprehensive scheme involving Indian lands was based on the fact the Act itself specifically included "tribal lands embraced within Indian reservations." *Id.* at 118 (citing §§ 3(2) & 4(e) of Act). *Oliphant v. Squamish Indian Tribe*, 435 U.S. 191 (1978), concerned *criminal*, as opposed to *civil* jurisdiction, and in *National Farmers*, this Court specifically distinguished *Oliphant* on that ground. *See* 471 U.S. at 854-855 & n.17; *see also* PA 30a-31a. *Burlington Northern R.R. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), dealt solely with federal law issues and issues of tribal law or sovereignty were not presented, *compare, e.g., Burlington Northern R.R. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991) (holding that when tribal issues are presented, the application of the tribal exhaustion doctrine is "not discretionary, it is mandatory"), while *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814 (7th Cir. 1993), dealt with a commercial contract that, by its terms, provided for non-Indian jurisdiction.

6. *See, e.g.*, 15 U.S.C. § 78(aa) (securities fraud lawsuits: "The District Courts of the United States . . . shall have exclusive jurisdiction . . . of all suits in equity and actions at law brought to enforce any liability or duty created this Chapter."); *see also, e.g.*, 42 U.S.C. § 9613(b) (environmental laws); 15 U.S.C. § 717(u) (natural gas regulation); 25 U.S.C. § 1132(e) (ERISA); 42 U.S.C. § 6903(13)(A) (CERCLA provisions specifically making Act applicable to "Indian tribe[s] or authorized tribal organization[s]"); 25 U.S.C. § 737(c) (providing that federal courts shall have exclusive jurisdiction concerning violations of law arising out of gaming activities conducted by the Alabama and Coushatta Indian Tribes of Texas); 25 U.S.C. § 1300g-6(c) (same; Yselta del Sur Pueblo tribe).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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